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No. 81-754

In the Supreme Court of the United States

OCTOBER TERM, 1981

ANTHONY VALLONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Speedy Trial Act of 1979 requires a 30-day continuance upon the filing of a superseding indictment.

2. Whether petitioner's Fourth Amendment rights were violated by a warrantless entry into private premises, based on exigent circumstances, in order to effectuate a felony arrest.

3. Whether approval of a wiretap application by the Assistant Attorney General in charge of the Criminal Division is valid when the Attorney General who designated that official pursuant to 18 U.S.C. 2516(1) has left office.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1981. A petition for rehearing was denied on July 29, 1981 (Pet. App. 11a-12a). The petition for a writ of certiorari was filed on September 24, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of New York upon entry of

a guilty plea to conspiracy to possess and distribute heroin, in violation of 21 U.S.C. 846, and possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1).[1] Petitioner was sentenced to concurrent terms of 20 years' imprisonment, to be followed by a ten-year special parole term. Petitioner's guilty plea was conditioned on the preservation of his right to appeal the district court's denial of certain pretrial motions. The court of appeals affirmed (Pet. App. 1a-10a).

Petitioner was a member of an organization that engaged in the wholesale distribution of massive amounts of extraordinarily pure heroin to other drug dealers in the New York City area. The head of the organization was co-defendant Anthony Todisco, who arranged for wholesale deliveries and sales. Petitioner and co-defendant Leonard Barracano were Todisco's lieutenants; their function was to store and deliver heroin for Todisco. Co-defendants Hector Torres and Luis Acosta functioned as sellers and promoters, while co-defendants David D'Angelo and Salvatore Sferrazza were the organization's chief suppliers. Co-defendant Alphonse Zambuto stored heroin at his house and co-defendant John Campopiano, Todisco's uncle, helped plan sales and coordinate supplies.

From May 14 to September 3, 1980, DEA Special Agent William Silvestri made six separate purchases of heroin from the Todisco organization (Tr. 574-582, 617-622, 681-691, 769-772, 1035-1038, 1170-1175).[2] On September 1, 1980, Agent Silvestri arranged to purchase three kilograms of heroin from co-defendant Acosta on September 3, 1980.

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[1]Petitioner and seven of his co-defendants pleaded guilty prior to trial. Co-defendant David D'Angelo was convicted following a jury trial.

[2]"Tr." refers to the transcript of co-defendant D'Angelo's trial.

The sale was to take place in six one-half kilogram installments (Tr. 1091-1108). DEA agents monitored the preparations for this sale by a court-authorized wiretap on Todisco's phone. In the morning of September 3, 1980, Todisco and petitioner left Todisco's home and drove to an apartment at 610 Waring Avenue, in the Bronx. This apartment was later found to be a "stash", *i.e.*, a place for storing drugs and drug paraphernalia. Petitioner left the Waring Avenue apartment and made the first transfer of one-half kilogram of heroin to co-defendant Torres for delivery to Agent Silvestri. Petitioner then returned to 610 Waring Avenue and was on his way to make the second delivery when DEA agents placed him under arrest (Tr. 1170-1176). Immediately thereafter, Torres and Acosta were also arrested (Tr. 1179-1180).

Shortly after noon, a DEA supervisor authorized the arrest of co-defendant Todisco, who was inside the apartment at 610 Waring Avenue. The DEA supervisor believed that the apartment contained substantial amounts of narcotics, and he knew that Todisco would be expecting petitioner to return momentarily. The supervisor decided to authorize Todisco's immediate arrest because he feared that Todisco would learn of the arrests of the others and attempt to flee or destroy evidence in the apartment (H. Tr. 1759-1766, 1772-1776).[3] The agents gained entry into the apartment by a ruse and arrested Todisco. Upon entering, the agents saw what appeared to be several pounds of heroin on a table. A subsequent search of the apartment pursuant to a search warrant revealed the contents of a narcotics "stash": two kilograms of pure heroin, large quantities of dilutants, thousands of baggies, scales, other narcotics paraphernalia and firearms (Tr. 1182-1192).

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[3] "H. Tr." refers to the transcript of the suppression hearing.

ARGUMENT

1. Petitioner contends (Pet. 4-7) that the Speedy Trial Act of 1979 mandates a 30-day continuance upon the filing of a superseding indictment, and he argues that the district court erred in denying his motion for such a contiunance after a superseding indictment was filed on November 25, 1980. There is no merit to this claim.

The Speedy Trial Act of 1979 provides that, absent written consent of the defendant, trial may not commence until at least 30 days after the defendant first appears through counsel on the charge. 18 U.S.C. (Supp. III) 3161(c)(2). All of the defendants, including petitioner, were indicted on September 11, 1980, and arraigned on September 19, 1980. Trial originally was scheduled to begin on November 17, 1980, and then was adjourned to December 1, 1980. The trial (of co-defendant D'Angelo) actually began on December 9, 1980, nearly three months after the indictment was filed. (Petitioner pleaded guilty prior to the trial.) Thus, no defendant would have been forced to trial within 30 days of arraignment on the initial charges.

The filing of the superseding indictment on November 25, 1980, did not entitle petitioner to a 30-day delay of the trial. The superseding indictment merely added as substantive counts conduct that previously had been alleged as overt acts in the original indictment. Discovery had been provided with respect to those events prior to the filing of the superseding indictment, and the government voluntarily provided more formal particulars as to each of the three additional counts on the day the superseding indictment was filed. Thus, the changes made by the superseding indictment were essentially technical, and the facts underlying each of the three new substantive counts came as no surprise to the defense. In these circumstances, the court of appeals correctly concluded (Pet. App. 8a) that nothing in

the Speedy Trial Act divested the district court of its discretion to grant or refuse a continuance,[4] and that the district court did not abuse its discretion in refusing to grant a continuance here. See *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964).

2. Petitioner contends (Pet. 8-13) that exigent circumstances did not justify the warrantless arrest of Todisco at the Waring Avenue apartment and that items subsequently seized from that apartment should have been suppressed. This claim does not warrant review.

To begin with, petitioner failed to carry his burden of establishing that his own Fourth Amendment rights were violated by the entry into the Waring Avenue apartment. See *Rakas* v. *Illinois*, 439 U.S. 128, 131 n.1 (1978). Apart from submitting an affidavit stating in conclusory fashion that he had an expectation of privacy in the premises, petitioner offered no evidence that he either resided at the apartment or otherwise had a sufficient interest in the premises to challenge the entry on Fourth Amendment grounds.[5]

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[4]Under the speedy trial plans adopted by the Second Circuit and the United States District Court for the Southern District of New York, superseding indictments are not subject to the 30-day rule of 18 U.S.C. (Supp. III) 3161(c)(2) if, as here, the original indictment is still pending on the date the superseding indictment is returned. "Guidelines Under the Speedy Trial Act of the Judicial Council of the Second Circuit," Part II-L, Comment at 27-28, 31 (Jan. 16, 1979). Southern District "Plan for Prompt Disposition of Criminal Cases," § 4(d)(2) (Approved June 25, 1980; effective July 1, 1980). If the subsequent indictment has added new charges, the only inquiry is whether the trial court should grant a continuance "in the interest of justice" to permit the defense additional time to prepare its case on the new charges.

[5]The evidence showed that the apartment was rented by co-defendant Barracano. At the pretrial hearing, co-defendant Todisco testified that he, Barracano, and petitioner had keys to the apartment, that they used the apartment for assignations, and that no narcotics were kept there (see H. Tr. 1240-1301). In view of the unequivocal evidence that the apartment was used as a "stash" for narcotics (Tr. 1182-1192), however, there is little basis for crediting Todisco's testimony.

Even if petitioner had a legitimate expectation of privacy in the premises, the court of appeals correctly concluded (Pet. App. 5a-6a) that the agents' warrantless entry into the apartment to arrest Todisco was justified by exigent circumstances.[6]

Petitioner's assertion that the exigent circumstances that existed at the time of Todisco's arrest were "manufactured" by the government agents, and that the agents should have anticipated these circumstances and obtained in advance a warrant for Todisco's arrest, are unfounded. The record shows that the agents did not plan in advance to arrest Todisco on September 3, 1980. On the contrary, as the evidence at the suppression hearing clearly established, it was the government's decision that "under no circumstances" was Todisco to be arrested at the same time as petitioner and the other co-conspirators (H. Tr. 1763). The reason for this decision was the hope that petitioner's arrest (which was planned in advance) would prompt Todisco to engage in incriminating conversations over his tapped telephone (H. Tr. 1763, 1807, 1867). Todisco had not previously involved himself directly in the undercover purchases and, accordingly, the government agents affirmatively planned not to arrest him but to continue their investigation as to him. What the agents could not and did not anticipate was that Todisco would become directly involved in the drug sale and would wind up at 610 Waring Avenue "sitting on a load of heroin" (H. Tr. 1774). At this juncture, the agents faced exigent and unforeseen circumstances. Petitioner, Torres and Acosta had been arrested.

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[6]Because the agents were armed with neither a search warrant nor an arrest warrant, and because it was established at the time of the entry that, at the least, an arrest warrant was required to effect an arrest entry into private premises (*Payton* v. *New York*, 445 U.S. 573 (1980); *United States* v. *Reed*, 572 F. 2d 412 (2d Cir.), cert. denied, 439 U.S. 913 (1978)), the validity of the entry in this case necessarily turns on the presence of exigent circumstances.

Todisco could be expected to learn of the arrest, if not directly by phone, then indirectly by petitioner's failure to return after the second of six half-kilogram heroin deliveries scheduled for that day. Thus, there is no merit to petitioner's claim that the exigent circumstances were "manufactured."

Moreover, the exigent circumstances were sufficient to justify a warrantless entry. The district court found (H. Tr. 1868-1873) that the offense in question was a grave one, involving large amounts of heroin; that there was clear probable cause to arrest Todisco; that the agents had reason to believe that Todisco had access to guns inside the Waring Avenue apartment; that the agents, having seen him enter, were virtually certain that Todisco was inside the apartment; and that there was a possibility that Todisco might have attempted to escape. Thus, because the initial entry into the apartment was proper, the courts below correctly refused to suppress the evidence obtained following that entry.[7]

3. Petitioner contends (Pet. 14-16) that the approval of the application for a wiretap on Todisco's home telephone was invalid because the order granting authority to the Assistant Attorney General in charge of the Criminal Division to approve such applications had been issued by former Attorney General Bell, who had resigned prior to the Todisco wiretap application. This contention is insubstantial.

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[7]There is no merit to petitioner's contention (Pet. 13) that Todisco could have been arrested on the street rather than inside the Waring Avenue apartment. As a factual matter, the decision to arrest Todisco was a matter within the authority of DEA supervisor Pavlick, who was out of communication with the agents following Todisco until Todisco reentered the apartment (H. Tr. 1765). There is no basis for concluding that the government agents in any way abused their "broad discretion in determining the appropriate time for arrest." *United States* v. *Santiago*, 327 F. 2d 573, 574 (2d Cir. 1964). See *United States* v. *Gomez*, 633 F. 2d 999, 1005 (2d Cir. 1980).

Under 18 U.S.C. 2516(1), wiretap applications may be authorized by the Attorney General or by any Assistant Attorney General specifically designated by the Attorney General. On August 15, 1978, Attorney General Bell issued an order specifically designating the Assistant Attorney General in charge of the Criminal Division to authorize applications for court-ordered wiretaps. At the time of this order, the Assistant Attorney General in charge of the Criminal Division was Philip Heymann. The record shows that Mr. Heymann personally reviewed and approved the application for the Todisco wiretap (H. Tr. 1886-1888). At the time Mr. Heymann approved the Todisco wiretap application, however, Attorney General Bell had resigned and been replaced by Attorney General Civiletti.

The court of appeals correctly held (Pet. App. 4a-5a) that there was no impropriety in the method by which the wiretap was authorized. There can be no doubt that the designation of Assistant Attorney General Heymann to approve wiretap applications remained in full effect following Attorney General Bell's resignation. As the Ninth Circuit concluded in *In re Weir*, 520 F. 2d 662, 667 (1975), with respect to a similar claim involving immunization authorizations under 18 U.S.C. 6003:

> The rules and orders of an Attorney General continue to govern the Department of Justice (notwithstanding the advent of new Attorneys General) until they are changed or altered. This is the customary way in which administrative agencies operate.

See also *United States* v. *Morton Salt Co.*, 216 F. Supp. 250, 255-256 (D. Minn. 1962), aff'd, 382 U.S. 44 (1965). Petitioner's reliance (Pet. 14) on *United States* v. *Giordano*, 416 U.S. 505 (1974), is misplaced for the reasons stated by the court of appeals (Pet. App. 5a). In this case,

unlike in *Giordano*, the Assistant Attorney General personally approved the wiretap application.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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